proceedings in Singapore until the action run in California *has been litigated to a finish* in the American Courts; there will be an order accordingly. There will be liberty to the parties herein to apply. As to the costs of the summons before the learned Registrar and me they are reserved. There will be no certificate for two counsel in regard to the Summons proceedings. I certify no further argument.

Order accordingly.

Solicitors: *Drew & Napier; Ho Ung Tuck & Co., Godwin & Co.*

MALAYSIA REPORTS

KRISHNA SREEDHARA PANICKA v. CHIAM SOH YONG REALTY CO. LTD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. and Yusoff Mohamed J.) March 7 & August 18, 1982]
[Johore Bahru – Federal Court Civil Appeal No. 27 of 1981]

Landlord and Tenant – Application for recovery of premises – Whether controlled premises – Premises built before January 31, 1948 – Premises demolished and re-built – Extensive alterations and additions – Whether new building created – Claim for double rent – Civil Law Act, 1956, s. 28 (4)(a).

In this case the respondents had made additions and alterations to an old two-storey building known as 25 Jalan Ah Fook, Johore Bahru and converted it into two premises No. 25 and 25A. The appellant became tenant of No. 25A at a monthly rental of $300/- and No. 25 at a monthly rental of $680/-. The respondent served notices to quit on both premises. He obtained judgment for possession of No. 25A in the Sessions Court and the appeal to the Federal Court was dismissed – see [1976] 1 M.L.J. 224. The respondent applied for possession of No. 25 Jalan Ah Fook in the High Court and the learned trial judge gave judgment in his favour. The learned trial judge also gave double rent to date from August 1, 1979. The appellant appealed.

Held (1) the learned trial judge was correct in holding that after the alterations and additions the whole building had been rebuilt and became a new building and in giving judgment for possession;

(2) (by a majority, Wan Suleiman F.J. dissenting) the learned trial judge was correct in holding that on the facts the respondent should be given double rent from 1st August 1979 and not from the date of the notice to quit, that is, March 1, 1971.

Cases referred to:

(1) *Krishna Sreedhara Panicka* v. *Chiam Soh Yong Realty Company Ltd.* [1976] 1 M.L.J. 224.
(2) *Yong Chiang* v. *Bong Tjhin Oi* [1973] 2 M.L.J. 136.
(3) *Kai Nam* v. *Ma Kam Chan* [1956] A.C. 358.
(4) *Eastern Realty Co. Ltd.* v. *Chan Hua Seng* [1967] 2 M.L.J. 195.
(5) *Success Enterprises* v. *Eng Ah Boon* [1968] 1 M.L.J. 75.
(6) *Pritam Kaur* v. *Rajaratnam & Anor* [1970] 2 M.L.J. 109.
(7) *Tioh Kooi Lan* v. *Ismailjee* [1972] 1 M.L.J. 64.
(8) *Crook* v. *Whitbread* 88 L.J.K.B. 959.

FEDERAL COURT.

Subra Naicker for the appellant.
N. Jegathesan for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (read by Yusoff Mohamed J.): We dismissed appellant's appeal against the decision of the learned Judge that the additions and alterations carried out on an old two-storey building were of such a nature and extent as to make the said building into two new and separate premises thereby excluding them from the protection of the Control of Rent Act, 1966. However, we reserved judgment on the respondents' cross-appeal on the question of double rent.

The facts are set out fully in the judgment and it is not necessary to repeat them here. As a result of additions and alterations carried out in 1959 to an old two-storey building known as No. 25, Jalan Ah Fook, Johore Bahru which was built before January 31, 1948 the Town Council rated the whole building as two distinct units. The ground floor became No. 25 and the first floor No. 25A. Appellant became tenant of No. 25A in 1961 at monthly rental of $300/- and No. 25 in 1966 at monthly rental of $680/-. He was served with notices to quit on both premises. After expiry of the notices he failed to quit. Because of jurisdictional limits respondents initiated two actions – one for vacant possession of No. 25A in the Sessions Court and the other also for vacant possession of No. 25 in the High Court. The case in the Sessions Court was heard first. Respondents succeeded in obtaining possession of No. 25A on July 31, 1979 after this court dismissed the appeal in *Krishna Sreedhara Panicka* v. *Chiam Soh Yong Realty Company Ltd.*[1]

This appeal is concerned with No. 25. On the evidence it is not surprising that the learned Judge held that after the alterations and additions the whole building had been rebuilt and became a new building with a new physical appearance. The alterations and additions were very extensive. He stated at page 77 of the Appeal Record:–

> "To effect the alterations to the ground floor of the building, the office with wooden partitions was demolished, the wooden staircase leading from the ground floor to the first floor was dismantled, the bathroom and the bucket system toilet were knocked down, the decayed wooden shutters at the entrance were demolished, and the cement floor which was in a bad condition was broken up. In our mind's eyes, we can see standing, the two side walls and the back wall and nothing else."

He considered the old building to have been destroyed, albeit a self induced destruction. He described the various changes made to the two floors of the old building in these words at page 76 of the Appeal Record:–

> "The entrance to the front concrete staircase to the first floor is outside the building and not inside the ground floor. As such, the first floor becomes completely separate and independent with its own access. As a result of the alterations and additions, the first floor became completely cut off from the ground floor. In the result, the Town Council rated it separately as premises No. 25A in respect of the first floor and as premises No. 25 Jalan Ah Fook, Johore Bahru for the ground floor."

In *Yong Chiang* v. *Bong Tjhin Oi*[2] it was held that an altogether different building had arisen out of the ashes of the old, even though the building was built on the same foundation and had the same ground floor. Therefore, the premises were not controlled premises. In his judgment Suffian, F.J., as he then was, examined five cases, namely, the Hong Kong case of *Kai Nam* v. *Ma Kam Chan*,[3] two Singapore cases of *Eastern Realty Co. Ltd* v. *Chan Hua Seng* [4] and *Success Enterprises Ltd* v. *Eng Ah Boon*[5] and two Malayan cases of *Pritam Kaur* v. *Rajaratnam & Anor*[6] and *Tioh Kooi Lan* v. *Ismailjee.*[7] He applied the test laid down by the Acting Chief Justice of Hongkong in *Kai Nam's case*[3] and approved by the Privy Council. At page 368 Lord Cohen, delivering the judgment of the Board, agreed with the test that:–

> "... where the damage has been so extensive that repair is impossible, when there is nothing left which could possibly be called a building, then surely the existence of that building as such is terminated and that a building replacing it would be an entirely new building even though it was built on the same foundations and had the same floor as the old one."

These cases and *Krishna Sreedhara Panicka's case*[1] were dealt with by the learned Judge admirably. He also referred to the views of Azmi, then L.P. and the late Ali, F.J. in *Tioh Kooi Lan's case*[7] and also the dissenting judgment of Ali, F.J. in *Krishna Sreedhara Panicka's case.*[1] He considered that they were of the view that "a building completed before January 31, 1948 would remain a 'controlled premises' under the Control of Rent Act, 1966 even though the building has undergone a substantial structural alteration since it was completed and it will not lose its identity as 'controlled premises' even though after that date the building has been so fundamentally changed that it could no longer be said to exist and another building has replaced it."

In the light of the numerous authorities cited it seems clear that whether an old building has become a new building would depend upon the degree of change effected by the additions and alterations. We agree entirely with the view of Raja

Azlan Shah, F.J., as he then was, in *Krishna Sreedhara Panicka's case*[1] when he said at page 230:–

"It seems to me, on principle and authority, that whatever the case may be, be it a case of self-induced repairs and renovations or extensions or damage and repairs, or rebuilding, the test is the same – the degree of change effected. This line of reasoning, in my opinion, is also implicit in the judgment of the Lord President in *Yong Chiang's case*[2] where he opined that, in spite of the dissimilarity in the three rent statutes, the test whether a building is excepted from the operation of any of the statutes is the same, and that is, the degree of change effected."

The learned Judge was perfectly right to say that he was bound by the decisions of this court in *Krishna Sreedhara Panicka's case*[1] and *Yong Chiang's case.*[2] We see no reason for interfering with this decision. Hence, we dismissed the appeal with costs and ordered the deposit to be paid to respondents on account of taxed costs.

As regards the cross-appeal on double rent, the learned Judge concluded his judgment thus:–

"In terms of damages for the holding over of the premises after the tenancy has been lawfully terminated, the plaintiffs prayed for a double-rent and not mesne profit. On behalf of the plaintiffs it was submitted that the plaintiffs have the right to claim double-rent under section 28(4)(a) of the Civil Law Act, 1956. I found that double-rent might be awarded if the conduct of the defendant in holding over the premises had been unreasonable. And since after the judgment of the Federal Court and the undertaking given by the solicitors for the defendant to vacate premises No. 25A and No. 25 simultaneously, the defendant on July 31, 1979 had failed to do so, I allowed double-rent to be chargeable as from August 1, 1979 till date of delivery of vacant possession by the defendant.

I gave judgment in favour of the plaintiffs accordingly with costs."

The learned Judge gave reasons for the award of double rent to date from August 1, 1979. Neither party has been able to cite any authority in support. The learned Judge was clearly unhappy with the conduct of the parties. In the Sessions Court solicitors for respondents had given an undertaking to withdraw the High Court action but they never did. However, the learned Judge noted from correspondence produced it became clear that solicitors for appellant had agreed not to bind the solicitors for respondents to the undertaking given earlier. The learned Judge said at page 74 of the Appeal Record that:–

"... In fact, it was disclosed that in 1977 the defendant had agreed to vacate premises No. 25, Jalan Ah Fook when his appeal to the Federal Court in relation to the premises No. 25A, Jalan Ah Fook was dismissed. However, the defendant failed to deliver vacant possession of premises No. 25, Jalan Ah Fook when the defendant finally vacated premises No. 25A, Jalan Ah Fook on July 31, 1979."

Respondents argued that the learned Judge was wrong not to award double rent from the date of expiry of the notice to quit, that is, March 1, 1971. Their contention is that double rent ought to be given as there is no question of discretion. Section 28(4)(a) of the Civil Law Act, 1956 reads:–

"4(a) Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not."

Respondents submitted that the word "shall" is mandatory. On the other hand, appellant submitted that the words "shall be chargeable" in the said section gave the court a discretion. The question whether the legislature intends a provision to be mandatory or discretionary must depend in each case on the scope, object and general scheme of the enactment. The Control of Rent Act, 1966 expressly enacts that where a tenancy exists the rent shall not be increased beyond certain prescribed limits. How are we then to infer from the statute an intention to alter the law where no tenancy exists, where there is no landlord and no tenant? Clearly, there is no obligation to pay rent. However, the legislature has, in another Act, used the words "double the amount of his rent". The respondents' claim is actually not rent but a penal sum which the former tenant has to pay for the inconvenience and loss he causes the landlord in refusing to give vacant possession of the premises on the determination of the tenancy. The provision, being penal in nature, must be construed with some degree of stricture. In awarding damages the court always has a discretion. Respondents are asking the court to apply the doctrine of relation back. Damages can only be recovered as from the determination of the lease, whatever form it may take, whether by effluxion of time, notice to quit or by re-entry under a proviso for that purpose. In our case the conduct of the parties were such that the learned Judge had to decide as to the best course to take in the absence of any authority to guide him. The learned Judge was of the view that the parties had come to some sort of understanding and considered it to be unconscionable for respondents to claim double rent from the expiry of the notice.

In *Crook* v. *Whitbread*[8] the tenant continued to be in occupation after the expiration of the notice to quit and tendered the quarter's rent due but the landlord refused it. Subsequently, the landlord brought an action claiming double value under the Landlord and Tenant Act, 1730 and alternatively for use and occupation. Held, that, having regard to the provisions of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 which contemplated that so long as the tenant continued to pay the rent agreed and to perform the conditions of the tenancy, he should not be turned out of occupation, the defendant could not be said to be holding over contumaciously and was therefore not liable for double value under the 1730 Act. In dismissing the appeal from the decision of the County Court Judge Avory, J. referred to four cases and said at page 961:–

"In all those cases it held that there must be something in the nature of contumacy on the part of the tenant in holding over to render him liable to double value."

Although the provisions of section 28(4)(a) of the Civil Law Act may not be the same as the provisions of the Landlord and Tenant Act, 1730, *Crook* v. *Whitbread*[8] does support the view of the learned Judge, that is, to avoid double rent if the tenant's conduct in holding over the premises had been unreasonable. He made a decision based on the particular facts of the case. I see no reason to interfere with the exercise of his discretion. Accordingly, I would dismiss the cross-appeal with costs.

Yusoff Mohamed J. concurred.

Wan Suleiman F.J. (dissenting): We dismissed this appeal with costs, and I agree that our grounds for so doing are most adequately set out in the judgment of the Chief Justice of Borneo.

However, with the deepest respect I have come to a different conclusion on the cross-appeal, wherein respondents argued that in not awarding double rent from the date of expiry of the notice to quit i.e. March 1, 1971 the learned Judge was wrong in law.

Section 28(4)(a) of the Civil Law Act, 1956 on which the respondents rely reads:–

"Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not."

I am of the view that respondents are correct in saying that this leaves the Court with no discretion. At the option of the landlord the Judge will have to award double rent from March 1, 1971, the day on which the notice to quit expired.

In the face of such clear statutory provision as above, the requirement of contumacy on the part of the tenant in holding over in *Crook* v. *Whitbread*[8] cannot, in my view, be applicable.

I would therefore allow the cross-appeal, and award double rent from the date of expiry of the notice to quit viz. March 1, 1971. Costs of the cross-appeal to the respondent company.

Appeal dismissed.

Solicitors: *Subra Naicker & Co.; John Ang & Co.*

MOHAMED NORDIN BIN JOHAN v. ATTORNEY-GENERAL, MALAYSIA

[F.C. (Raja Azlan Shah, Ag. L.P., Abdul Hamid F.J. & Abdoolcader J.) September 17, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 233 of 1982]

Administrative Law – Certiorari – Application for – Certificate of Attorney-General that commission of offence affects security of the Federation – Security case – Discretion of Attorney-General one of pure judgment and not amenable to judicial review – Essential (Security Cases) Regulations, 1975, Regulations 2 (2) & 6(1).

Practice and procedure – Certiorari – Application for – Leave refused – Appeal to Federal Court – Federal Court allowing appeal and exercising jurisdiction to hear substantive motion – Application dismissed – Application for declaration – Wrongly struck out – Appeal allowed but application withdrawn – R.H.C. 1980 O.18, r.19.

In this case the appellant together with four others were charged with the murder of the former Negri Sembilan State Assembly Speaker. The offence was alleged to have been committed 7 days after nomination day for the Federal and State Elections 1982. The Attorney-General who appeared for the prosecution tendered two certificates under regulations 2(2) and 6(1) of the Essential (Security Cases) Regulations, 1975, the effect of which was that the Attorney-General treated the offence as a security offence and specified the High Court Kuala Lumpur as the place of trial. He also successfully applied for the transfer of the case to the High Court Kuala Lumpur. The appellant applied for leave to apply for an order of certiorari to quash the two certificates and the order transferring the case to the High Court, Kuala Lumpur. The learned trial judge refused leave and the appellant appealed. The Federal Court allowed the appeal and granted the appellant leave to apply for the order of certiorari and then heard the substantive motion itself. The appellant had also applied for